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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 1176

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,

v.

ANITA PRITCHARD, Administratrix of the Estate of OTTO E. PRITCHARD, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Liggett & Myers Tobacco Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in this cause on July 26, 1965, and amended December 22, 1966.

OPINIONS BELOW

The opinion and amended opinion of the court of appeals are reported at 350 F.2d 479 (1965), *cert. denied,* 382 U.S. 987 (1966) and at 370 F.2d 95 (1966). They are reprinted in the appendix to this petition (A-26 and A-56).* The opinion of the district court denying respondent's post trial motions is set forth in petitioner's appendix in the court of appeals (114b-127b).**

A prior opinion of the Court of Appeals for the Third Circuit which ordered the retrial out of which this cause now arises is officially reported at 295 F.2d 292 (3rd Cir. 1961) and reproduced in respondent's appendix in the court of appeals (26a-48a).***

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*The abbreviation "A" refers to the appendix to this petition.

**Petitioner's appendix in the court of appeals will be cited by page numbers followed by a "b."

***Respondent's appendix in the court of appeals will be cited herein by page references followed by an "a."

JURISDICTION

Jurisdiction to review by writ of certiorari the judgment of said court of appeals entered July 26, 1965 and amended December 22, 1966 is invoked under the provisions of 28 U.S.C.A. § 1254(1). A timely petition for rehearing in banc from the amended judgment was filed by petitioner on January 6, 1967 and denied on February 1, 1967.

QUESTIONS PRESENTED

1. By amending its original opinion, judgment and mandate from ordering a "new trial" to ordering a partial new trial limited to the issues of liability and damages, but excluding from the new trial whether or not smoking was the cause or one of the causes of plaintiff's cancer, did the Court of Appeals for the Third Circuit deny defendant a fair trial as guaranteed by the Seventh Amendment to the Constitution of the United States?

2. Did the court of appeals have the power and jurisdiction to recall its original mandate, amend its judgment and opinion and reissue its mandate seventeen months after its original judgment, after this Court had denied certiorari, and after proceedings had begun in the district court with respect to a new trial?

Questions Presented.

3. Petitioner also raises the questions contained in its Petition for a Writ of Certiorari filed with this Court at Number 691, October Term, 1965.*

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*The questions presented in that petition are:

1. Where no objection was made to the Trial Court's instructions to the jury nor to the special interrogatories on which the issues were submitted to the jury and no additional instructions on the points in issue were requested, can the Court of Appeals reverse a jury verdict and order a new trial on alleged errors in the instructions in the face of the clear and explicit language of Rule 51 of the Federal Rules of Civil Procedure which bars consideration on appeal of alleged errors in instructions unless specific objections with the grounds distinctly stated are made at the trial?

2. If a "plain error" exception is to be engrafted on Rule 51 despite its unambiguous and mandatory language, what are the criteria for the application of such an exception, and is this a proper case for its application?

3. Was there sufficient evidence in the record to require the issue of assumption of risk to be submitted to the jury pursuant to the Seventh Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

1. The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

2. Rule 49(a) of the Federal Rules of Civil Procedure provides in part:

> "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue . . ."

3. Rule 51 of the Federal Rules of Civil Procedure provides in part:

> ". . . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection . . . ."

STATEMENT OF THE CASE

Federal jurisdiction is based upon diversity of citizenship.

This is an action to recover damages for cancer in one lung of plaintiff (respondent)* allegedly caused by his smoking Chesterfield cigarettes from 1924 until December 11, 1953, when the affected lung was removed. This case has had an extraordinary history. It has been tried twice with verdicts for the defendant both times and has been before the Third Circuit Court of Appeals on three separate occasions. The Third Circuit reversed both verdicts for the defendant. After the second reversal, this Court denied certiorari. Subsequently, after proceedings had started in the district court with regard to the third trial, the Third Circuit amended its opinion, judgment and mandate from ordering a full new trial to ordering a drastically truncated one. The amended judgment now directs that:

> ". . . a new trial be had limited to the issues of liability and damages, but no new trial shall be had as to the finding that the cause, or one of the causes, of cancer was the smoking of Chesterfield cigarettes by the plaintiff, ..." (A-55)

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*To avoid confusion, the parties will be referred to in this petition in the same manner as they were designated in the trial court and in the court of appeals, *i.e.*, respondent will be referred to as plaintiff and petitioner as defendant.

The plaintiff died March 2, 1963. His death did not result from cancer, and no vestige of cancer was found in him at his death. His wife, as administratrix of his estate, was substituted for him as a party to this cause.

The first trial ended in a directed verdict for defendant. The Third Circuit reversed and directed that the case be submitted to the jury on special interrogatories. After a second trial, the special interrogatories put to the jury and their answers were as follows (183a-184a):

"1. Was the smoking of Chesterfield cigarettes by the plaintiff the cause or one of the causes of cancer in his right lung?

ANSWER: Yes.

"2. Is the defendant chargeable with negligence which was a proximate cause of the plaintiff's injury?

ANSWER: No.

"3. Is the plaintiff chargeable with negligence which contributed in any degree to his injury?

ANSWER: ———.

"4. Did the plaintiff give notice of a breach of warranty within a reasonable time as required by the Sales Act?

ANSWER: Yes.

"5. Did the defendant make any express warranties upon which the plaintiff relied and by which he was induced to purchase Chesterfied cigarettes?

ANSWER: No.

5A. If so, did the defendant breach the said warranty?

ANSWER: ———.

"6. Was there a breach of the warranty implied by law as defined in the charge?

ANSWER: No.

"7. Did the plaintiff assume the risk of injury by his smoking of Chesterfield cigarettes?

ANSWER: Yes.

"8. If the defendant is liable, what is the total amount of the damages?

ANSWER: $ None."

Accordingly, judgment was entered for defendant.

On appeal, as stated by the Third Circuit, 350 F.2d 479, 482, plaintiff sought review only on grounds relating to express warranty and assumption of risk (Interrogatories 5 and 7), abandoning all other grounds. In his Brief on Appeal, plaintiff stated explicitly that he sought to negate and gain a new trial only with respect to those two interrogatories. Plaintiff requested that the case be sent back for a partial new trial on those issues and "that plaintiff and defendant are still bound by those interrogatories which have not been appealed from"; that is, Interrogatories 1, 2, 4, and 6 should be binding on plaintiff and defendant. See pages 10-11 of plaintiff's Brief on Appeal (A-58-59).

The court of appeals, on July 26, 1965, reversed on grounds of plain error in the charge on express warranty and assumption of the risk although no objection to these instructions was made at trial or even raised on appeal by plaintiff. Despite plaintiff's request for only a partial new trial on certain issues of express warranty, a complete new trial on express warranty was granted. The mandate read:

". . . that the judgment of the District Court . . . is hereby reversed, with costs and the action remanded with the direction that a new trial be had." (A-53)

Plaintiff did not file a petition for rehearing. De-

fendant, on October 22, 1965, petitioned this Court for a writ of certiorari which was denied on January 17, 1966.

On June 24, 1966, the parties met with the Honorable John L. Miller at a pretrial conference. For the first time since the opinion of the Third Circuit almost a year earlier, plaintiff then contended that the retrial should be limited to certain elements of express warranty and that defendant should be bound by the jury's answer to Interrogatory No. 1 on causation. Defendant contended that the mandate of the court of appeals was clear and unambiguous and required a full retrial of express warranty. Judge Miller gave plaintiff the opportunity to submit a memorandum on this issue. Instead, on July 22, 1966, plaintiff filed "A Motion for Clarification of Mandate" in the court of appeals.

The Third Circuit on December 22, 1966:

(a) Recalled the mandate which had previously issued on September 17, 1965;

(b) Amended the opinion and judgment entered on July 26, 1965 to provide that the new trial be "limited" to the issues of liability and damages, "but no new trial shall be had as to the finding that the cause, or one of the causes, of cancer was the smoking of Chesterfield cigarettes by the plaintiff as set forth in special finding of fact No. 1";

(c) Reissued the mandate as amended.

The amended opinion said, "Although the mandate does not require clarification, the earlier opinion of this Court and the mandate must be amended" (A-56). The

Third Circuit in its amended opinion ordered a partial new trial excluding the issue of causation. This was the precise relief the plaintiff requested, but the court refused to grant, on the appeal itself. No reasons for such amendment were stated in the order or in the amended opinion. Defendant petitioned for a rehearing in banc on January 6, 1967, but this was denied on February 1, 1967.

Thus, seventeen months after the reversal of the jury verdict for defendant, after a petition for certiorari was denied and after proceedings had again commenced in the district court, the Third Circuit drastically changed the scope of the third trial and foreclosed defendant from litigating a most important issue of fact in the case — whether or not smoking caused plaintiff's lung cancer.

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court of Appeals Below Deprives Defendant of Its Constitutional Guarantee of a Fair Trial and Raises Important Issues With Respect to the Scope of New Trials Following Reversal of a Judgment Based on Special Interrogatories.

The action of the Third Circuit in this case is so manifestly unjust that this Court should grant certiorari for this reason alone. In addition, the amendment of the opinion, judgment and mandate raises important issues with respect to the scope of new trials after reversal of a judgment based on special findings pursuant to Rule 49(a) of the Federal Rules of Civil Procedure. Here, the Third Circuit has reversed a judgment based on special findings because of alleged errors in the trial court's charge. Plaintiff made no objection to these instructions at trial, nor did he even claim on appeal that they were erroneous. Subsequently, seventeen months later, the Third Circuit amended its judgment and ordered a third trial in which defendant is foreclosed from litigating a most important issue of fact in the case — causation — which cannot be separated from a cause of action of express warranty without denying defendant a fair trial. See *Lawlor v. National Screen Serv. Corp.*, 352 U.S. 992 (1957).

A. As Interpreted by This Court, the Seventh Amendment Prohibits the Partial New Trial Ordered by the Third Circuit.

The amended judgment and mandate of the court below deprive defendant of the fair trial guaranteed

it by the Seventh Amendment to the Constitution of the United States. They require that the interrogatories on certain elements of liability and damages in a cause of action for express warranty, answered adversely to the plaintiff, be relitigated, but, at the same time, hold that the element of causation, the only interrogatory answered adversely to defendant, cannot be relitigated. This partial new trial clearly violates the standards enunciated in *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931). There, this Court refused to allow damages to be retried alone, but ordered a full new trial because the question of damages could not fairly be separated from that of liability. This Court said:

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. [Citations omitted] Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." (283 U.S. 494, 500). See also *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273, 279 (1959).

Since the decision in *Gasoline Products*, federal courts have consistently applied its principles. Partial new trials on damages alone have been allowed only where the issues relating to damages were distinct and separate from those relating to liability. *Mason v. Mathiasen Tanker Indus., Inc.*, 298 F.2d 28, 33 (4th Cir.), *cert. denied*, 371 U.S. 828 (1962); *Rosa v. City of Chester, Pa.*, 278 F.2d 876, 882-883 (3rd Cir. 1960); *Darbrow v. Mc-*

Dade, 255 F.2d 610, 611 (3rd Cir. 1958). Cf. *Bankers Life & Cas. Co. v. Kirtley,* 307 F.2d 418, 426 (8th Cir. 1962); *United Air Lines, Inc. v. Wiener,* 286 F.2d 302, 304-306 (9th Cir.), *cert. denied,* 366 U.S. 924 (1961); *Schuerholz v. Roach,* 58 F.2d 32, 33-34 (4th Cir.), *cert. denied,* 287 U.S. 623 (1932).

To be distinguished also are cases involving several distinct causes of action in which a partial new trial has been allowed on one of those causes of action. *Bank of Nova Scotia v. San Miguel,* 196 F.2d 950, 960 (1st Cir. 1952); *Barnes-Manley Wet Wash Laundry Co. v. Automobile Ins. Co.,* 175 F.2d 624, 625 (10th Cir. 1949).

No case which has attempted to apply the principles of *Gasoline Products* has ever divided a single theory of liability and allowed a retrial on less than all of the elements of that theory. In this case, the only theory of liability remaining is breach of express warranty. The Third Circuit does not propose to separate liability and damages. It has ordered a new trial on everything but a most important issue of fact in the case — causation. Without causation there can be no breach of an express warranty or any liability at all. It is so "interwoven" in the fabric of express warranty that it cannot be separated "without injustice."

Lower courts, including the Third Circuit, have refused to order new trials on less than all the elements of a theory of liability. For instance in *Hiltz v. Atlantic Ref. Co.,* 151 F.2d 159 (3rd Cir. 1945), the jury found, in answer to interrogatories, that the defendant was negligent, but that its negligence was not the proximate cause of plaintiff's injury. Error in the charge with respect to causation caused a reversal. Even though

there was no error with respect to the jury's finding of negligence, retrial of all elements of the cause of action was ordered because "the ends of justice require both the plaintiff and the defendant to have their respective days in court at a new trial." 151 F.2d at 162. Here, we have a similar situation where causation but not liability was found below.

In *Union Pacific R.R. Co. v. Bridal Veil Lumber Co.*, 219 F.2d 825 (9th Cir. 1955), *cert. denied*, 350 U.S. 981 (1956), plaintiff had paid a workmen's compensation claim and was suing the defendant for contribution. In answer to special interrogatories, the jury found the plaintiff negligent and found the defendant not negligent with respect to five (5) allegations, but failed to agree whether the defendant had been negligent with respect to one other important allegation. The Ninth Circuit reversed and on rehearing refused to order a partial new trial. Although the defendant complained bitterly of the necessity of proving plaintiff's negligence again, the Court stated it was not appropriate to have less than a full new trial.

B. Forcing the Defendant to Retry This Case of Breach of Express Warranty With Causation Already Adversely Decided Amounts to a Denial of a Fair Trial.

The Third Circuit's amended mandate, in effect, directs that a new jury be asked to determine whether defendant made any warranties and, if so, whether they were breached. At the same time, the mandate would require the jury to make this determination after being instructed that defendant's cigarettes were the cause

or one of the causes of plaintiff's lung cancer. It seems self-evident that separation of the element of causation from that of whether there was a breach of warranty is impossible without denying defendant a fair trial.

Every piece of evidence submitted at a limited trial as ordered by the Third Circuit would be evaluated not against a neutral background where all elements of a cause of action are to be decided, but against the background provided by the irrevocable resolution of an important element against defendant. No jury, in viewing the evidence on other elements, such as whether an express warranty was actually made and whether it was breached, could escape being influenced by a pronouncement from the Trial Judge that defendant's product caused decedent's cancer.

The Third Circuit has yoked defendant with this prejudicial millstone on the basis of one jury finding wrenched out of the context of other findings contemporaneously made. The jury found defendant was not negligent and had not breached any implied or express warranty. It is possible that the issue of causation was resolved against defendant as a compromise to prevent a hung jury. See *Schuerholz v. Roach*, 58 F.2d 32 (4th Cir.), *cert. denied*, 287 U.S. 623 (1932). Alternatively, though the jury unanimously decided not to impose liability, some members, who may have felt strongly that causation had not been proved, might nevertheless have been willing to compromise on the causation question, realizing that such a compromise would not affect the ultimate result. Or, the jury may well have resolved other elements in defendant's favor and then proceeded to consider causation as an academic question.

No one can know for a certainty what transpired behind the closed doors of the jury room. See Frankfurter, J. dissenting in *Delli Paoli v. United States,* 352 U.S. 232, 248 (1957); see also, *Jackson v. Denno,* 378 U.S. 368 (1964). No court can know or tell what effect the evidence on causation had upon the jury's determination of other elements of express warranty.

> "Moreover, it is by no means certain that a jury which has a free hand to find a verdict on the whole case will reach the same conclusion as one which has been given a binding instruction on one particular element of the damages." *Atlantic Coast Line R.R. v. Bennett,* 251 F.2d 934, 939 (4th Cir. 1958).

The same is true with regard to one particular element of liability.

The jury at the next trial should be free to consider and determine all of the elements of liability on express warranty without being fettered by the answer of the prior jury on causation. This is not the usual personal injury case where the injuries involved were immediately caused by an accident or other event and the only question is whether the defendant culpably caused the accident or event. Whether or not smoking is a cause of lung cancer remains a highly controversial matter in the medical and scientific world. This controversy existed at the time of the last trial and still exists.

At the last trial, evidence concerning defendant's liability was properly limited to facts which existed prior to the time when plaintiff's lung was removed — December, 1953. Evidence on causation, however, was not so limited and the latest facts were presented to the jury. That trial occurred in 1962. Since that trial,

intensive research to determine the cause of lung cancer has continued. During the last four and one-half years, much new scientific evidence has been developed. Much of this evidence tends to disprove the hypothesis that smoking causes lung cancer.

Congress, in 1965, held extensive hearings covering 2,293 pages on the issue of smoking and health.* Thirty-six leading doctors and scientists testified or submitted statements that the cause of lung cancer is still unknown. Congress concluded that the evidence only suggested that smoking *may* be harmful to health—not that it was harmful. House Report No. 499, 2 *U.S. Code Cong. & Admin. News,* 89th Congress, First Session, 2350, 2352 (1965).

We do not suggest that Congressional hearings or reports are admissible evidence. We do submit that the action of Congress indicates that the cause of lung cancer is not established, contrary to the assumption of the amended judgment. Defendant should be able to introduce into evidence at the next trial all admissible evidence on causation that exists. It should not be bound by a finding based on the evidence as it existed four and one-half years ago.

It is manifestly unfair to impose on defendant a finding based on what amounts to obsolete evidence in an area of medicine in which new facts are being developed constantly. If plaintiff could use all available evi-

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*Hearings Before the Senate Committee on Commerce, 89th Cong., 1st Sess., Ser. 89-5, 89-6 (1965).

Hearings Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 1st Sess., Ser. 89-11 (1965).

dence in 1962, defendant should be able to use all available evidence in 1967 on an issue which is still hotly debated in the medical and scientific community.

C. The Use of Special Interrogatories Does Not Abrogate the Rule in the Gasoline Products Case.

In its amended opinion, the Third Circuit gave no reasons to justify the amendment which so drastically limits the third trial of this action. Although the Third Circuit stated that the judgment "must" be amended, it pointed to no compelling reasons for which this unusual step was necessary, but merely cited *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964). Apparently there were no such compelling circumstances at the time of the original appeal from the second trial. Although plaintiff asked for a partial retrial and cited *Green*, the Third Circuit ordered a full new trial.

We submit that the court below was in error on this important question of federal procedure. It neither cited nor discussed *Gasoline Products*, nor did it state the reasons which justified ordering a partial new trial from which the element of causation was excluded. So far as the opinion reveals, the court did not consider the extreme prejudice of such a partial retrial to the defendant; prejudice which deprives the defendant of the fair trial guaranteed by the Seventh Amendment.

Certainly there is nothing in Rule 49(a) which invests special jury findings with immunity from the constitutional requirements of *Gasoline Products*. Although decided prior to the adoption of the Federal Rules of Civil Procedure, *Gasoline Products* still sets the per-

missible limits for granting partial new trials. In fact, the drafters of the Federal Rules of Civil Procedure intended *Gasoline Products* to govern Rule 59(a) which permits district courts to grant partial new trials. See Notes of Advisory Committee to Rule 59, 28 U.S.C.A. 15 (1960).

The Third Circuit in this case has ignored the constitutional requirements governing a partial new trial. It seems to hold that a special finding need not be relitigated regardless of whether the ensuing trial would meet the test of fairness set in *Gasoline Products*. This petition should be granted to settle this important question of Federal Civil Procedure.

II

The Decision of the Court Below Is in Conflict With Decisions of This Court and of Other Courts of Appeals on an Important Question of Federal Procedure and Is a Departure From the Accepted and Usual Course of Judicial Proceedings.

The decision of the court below was prompted by the filing of an unauthorized and untimely motion to clarify a mandate which was clear and unambiguous. In its amended opinion, the court below specifically recognized that its prior mandate did not require clarification (A-56). It thereupon should have dismissed plaintiff's motion. Instead, the court, on its own motion, went on to hold that the mandate must be amended. In so doing, the court below acted beyond its power and jurisdiction in the circumstances of this case.

Plaintiff's motion in the Third Circuit, filed a year after the original opinion and judgment, was entitled "Motion for Clarification of Mandate". The original judgment ordering a new trial clearly meant a full new trial, and it required no clarification as recognized by the Third Circuit. See *Roth v. Hyer,* 142 F.2d 227, 229 (5th Cir.), *cert. denied,* 323 U.S. 712 (1944); *Cub Fork Coal Co. v. Fairmount Glass Works,* 59 F.2d 539 (7th Cir. 1932); 5 *Am. Jur. 2d,* Appeal and Error, § 992; *Pasqual v. Owen,* 97 F. Supp. 157 (W.D. Mo. 1951); *Feldmann v. Connecticut Mut. Life Ins. Co.,* 57 F. Supp. 70 (E.D. Mo. 1944). On that ground alone, the motion should have been dismissed.

Plaintiff could not have moved to amend the original judgment since the time for such a motion had long since past. Rule 33 of the rules of the Third Circuit requires that a petition for rehearing be filed within 15 days after judgment is entered. On his appeal plaintiff sought a partial new trial which the Third Circuit did not grant, but ordered a full new trial. If plaintiff felt aggrieved by that decision, his sole remedy was to petition for rehearing. This he did not do. Plaintiff should not be able to circumvent the clear provisions of Rule 33 in the guise of a motion to clarify.

Nevertheless, the Third Circuit, on its own initiative and without ever disposing of plaintiff's motion, amended its previous judgment and mandate.

The action of the court below in recalling and amending its mandate under the circumstances existing in this case is without precedent in the Third Circuit or in any other circuit. The enactment of Section 452 of the Judicial Code in 1948 (28 U.S.C. § 452, effective September 1, 1948) removed the limitations im-

posed by the "end of term" rule as enunciated by this Court in the leading case of *Bronson v. Schulten,* 104 U.S. 410, 415 (1881). While Section 452 does not specify the circumstances under which a court of appeals may recall and amend its mandates after the end of the term in which they were issued, it is clear that this power may not be exercised except in rare instances and certainly not in this case.

The power of federal district courts to grant relief from judgments or orders entered by them, after the time for post-judgment motions has expired, is governed by the provisions of Rule 60 of the Federal Rules of Civil Procedure. Since the enactment of Section 452 of the Judicial Code, no similar governing principles have been enunciated by this Court with regard to the time within which courts of appeals may change their mandates. As illustrated by the decisions discussed below, however, it is clear that guidance may be had from the decisions of this Court rendered prior to the effective date of Section 452 of the Judicial Code.

This Court held in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.,* 322 U.S. 238, 244-245 (1944), that the special equity power to review and amend a judgment entered in a previous term in the court of appeals can only be exercised when enforcement of the judgment is "manifestly unconscionable." In that case, a fraud had actually been perpetrated upon the Court of Appeals for the Third Circuit, which held that even under those flagrant circumstances it lacked the power to amend the district court decree because the term had expired. This Court reversed that holding because the court of appeals itself had been defrauded and held that any such judgment must be set aside to protect

the public interest and the integrity of the judicial process.

This Court has also held that this power to amend a judgment is not to be exercised for the convenience of litigants.

> "While the power to act on its mandate after the term expires survives to protect the integrity of the court's own processes, *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, it has not been held to survive for the convenience of litigants. *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70.
>
> "The plaintiff has at no time moved to amend the mandate which is the basis of the judgment. That it made no provision for interest was apparent on its face. Plaintiff accepted its advantages and brings her case to this Court, not on the proposition that amendment of the mandate has been improperly refused, but on the ground that the mandate should be disregarded. Such a position cannot be sustained." *Briggs v. Pennsylvania R. R.*, 334 U.S. 304, 306-307 (1948).

In cases decided by courts of appeals of other circuits, where parties were unable to show that a prior judgment was "manifestly unconscionable," motions to recall mandates and amend judgments have been denied as disguised petitions for rehearing which were filed too late: *Legate v. Maloney*, 348 F.2d 164 (1st Cir. 1965); *Bankers Life & Cas. Co. v. Bellanca Corp.*, 308 F.2d 757 (7th Cir. 1962); *Lee v. Terminal Transp. Co.*, 301 F.2d 234 (7th Cir. 1962); *Hines v. Royal Indem. Co.*, 253 F.2d 111 (6th Cir. 1958); *Iverson's Estate v. Commissioner*, 257 F.2d 408 (8th Cir.), *cert. denied*, 358 U.S. 893 (1958).

In *Legate v. Maloney, supra,* the case had been sent back to the district court for further proceedings which had not yet been conducted. Upon a motion to recall, the Court of Appeals for the First Circuit ruled:

> "If we were in error in this appraisal, of which we are not presently persuaded, we believe it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari. There must be an end to dispute." 348 F.2d 166.

It is clear from an examination of the circumstances of the case at bar that the original mandate issued by the court below on September 17, 1965, was, as expressly recognized by the court below, clear and unambiguous; that the precise relief later given by the amended mandate of December 22, 1966, was requested, considered and then refused in the opinion and judgment filed on July 26, 1965 and in the mandate issued on September 17, 1965; and that nothing has happened since the issuance of the original mandate except that the court below has changed its mind.* Such an unprecedented interference with the prior mandate of a court below is in clear conflict not only with the decisions of other courts of appeals, but also with decisions of this Court rendered prior to the enactment of Section 452 of the Judicial Code. Since the enactment of Section 452 of the Judicial Code, this Court has not rendered any decisions involving the limitations on the power of courts of appeals to review and amend their mandates.

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*The court below did not purport merely to clarify its mandate. It amended it. The court said: "Although the mandate does not require clarification, the earlier opinion of this court and the mandate must be amended." (A-56)

In view of the conflict between the decision of the court below in this case and the decisions of other courts of appeals and in the interest of uniformity of federal procedure, this Court should grant this writ.

III

Defendant May Properly Present to the Court the Questions Raised in Its Prior Petition for a Writ of Certiorari Filed at No. 691, October Term, 1965.

The denial of our prior petition for certiorari has no precedential significance. This Court has granted certiorari and considered issues in cases where prior petitions had been denied. *Mercer v. Theriot,* 377 U.S. 152 (1964); *Indianapolis v. Chase Nat'l. Bank,* 314 U.S. 63 (1941); *Hamilton-Brown Shoe Co. v. Wolf Bros.,* 240 U.S. 251 (1916). Consequently, we urge the questions raised in our prior petition as additional grounds for granting certiorari now. The Third Circuit, in amending the judgment, has now treated this defendant with such manifest injustice that, if for no other reason, this petition should be granted in the exercise of this Court's supervisory power over lower federal courts. *Gibson v. Lockheed Aircraft Serv., Inc.,* 350 U.S. 356, 357 (1956).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TO PETITION

Original Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14802

ANITA PRITCHARD, ADMINISTRATRIX OF THE ESTATE OF OTTO E. PRITCHARD, DECEASED,

v.

Appellant,

LIGGETT & MYERS TOBACCO COMPANY, A CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued—December 8, 1964

Before GANEY, SMITH and FREEDMAN, *Circuit Judges.*

Opinion of the Court

(Filed July 26, 1965)

By SMITH, *Circuit Judge.*

The plaintiff brought this action for personal injury alleging that he contracted lung cancer as a result of having smoked Chesterfield cigarettes for many years. The claims for relief, stated in separate counts of the complaint, alleged negligence and breach of warranty as the bases of liability. The defendant, admittedly the manufacturer of the cigarettes, denied the allegations of the complaint and pleaded assumption of risk as an affirmative defense to each of the claims. The jurisdiction of the court below was invoked on the ground of diversity of citizenship and therefore under the facts of the case the law of Pennsylvania was applicable.

The action was heretofore before this Court on an appeal from a judgment entered on a directed verdict in favor of the defendant, 295 F.2d 292. The judgment was reversed and a new trial was granted pursuant to the mandate. The present appeal is from a judgment entered on a jury verdict in favor of the defendant. The earlier opinion of this Court contains a comprehensive summary of the pertinent evidence offered in the first trial. Since the evidence offered at the second trial did not differ substantially, we find it necessary to set forth herein only such additional facts as may be relevant to the narrow issues raised on this appeal.

The plaintiff, who was 63 years old at the time of the second trial, admittedly smoked cigarettes since he was 15 years of age. He was an habitual cigarette smoker for several years prior to 1924, when he began smoking Chesterfields for the first time. Thereafter, and during the critical period, between sometime in 1924 and the latter part of 1953, he smoked Chesterfields regularly, consuming "at least a carton" per week. There was ample evidence in the record from which the jury could have found, as it did, that the smoking of Chesterfields was a cause of the lung cancer, which was diagnosed and removed in 1953. This finding is not an issue on this appeal.

The alleged warranties were contained in a series of advertisements published periodically in both newspapers and magazines. These advertisements featured in bold type such factual affirmations as the following: "Chesterfields Are Best For You"; "Chesterfields Are As Pure As The Water You Drink And The Food You Eat"; "A Good Cigarette Can Cause No Ills"; "Nose, Throat

And Accessory Organs Not Adversely Affected By Smoking Chesterfields"; "Play Safe Smoke Chesterfields." (See also the earlier opinion of this Court). Many of the advertisements contained assurances that the affirmations were based upon extensive research and the opinions of medical specialists. There was implicit in these assurances a strong suggestion that while other brands of cigarettes might be harmful, Chesterfields were not.

This Court stated in its earlier opinion: "The evidence compellingly points to an express warranty, for the defendant, by means of various advertising media, not only repeatedly assured plaintiff that smoking Chesterfields was absolutely harmless, but in addition the jury could very well have concluded that there were express assurances of no harmful effect on the lungs."

The issues were submitted to the jury on a series of special interrogatories, Fed. Rules Civ. Proc., rule 49(a), 28 U.S.C.A., all of which, except one, were answered adversely to the plaintiff. The jury found: (1) the smoking of Chesterfield cigarettes by the plaintiff was "the cause, or one of the causes," of the cancer; (2) the defendant was not chargeable with negligence; (3) the defendant made no "express warranties upon which the plaintiff relied and by which he was induced to purchase" the cigarettes; and (4) the plaintiff assumed the risk of injury by his smoking the cigarettes. A judgment for the defendant in accord with the special findings was entered.

The plaintiff moved for a new trial on the grounds, among others, that the verdict on the breach of warranty issue was against the weight of the evidence, and the Court's instructions to the jury on the same issue were erroneous. The motion was denied. The only

grounds here urged as a basis for reversal are those relating to the breach of warranty issue; the others have been abandoned.

DENIAL OF MOTION FOR NEW TRIAL.

The plaintiff argues that the verdict was against the weight of the evidence and that the denial of his motion for a new trial, based on this ground, was error. It is well settled that a motion for a new trial on the ground herein urged is addressed to the sound discretion of the trial judge and its denial is not ordinarily reviewable on appeal. *Silverii v. Kramer,* 314 F.2d 407, 413 (3rd Cir. 1963); *Lind v. Schenley Industries, Inc.,* 278 F.2d 79, 89 (3rd Cir. 1960), cert. den. 364 U.S. 835; *Magee v. General Motors Corp.,* 213 F.2d 899 (3rd Cir. 1954). Since the judgment must be reversed on other grounds, we see no need to discuss the merits of the argument.

RELIANCE AS REQUISITE TO RIGHT OF ACTION

The breach of warranty issue was tried on the assumption that reliance of the purchaser was an essential element of an express warranty as defined by statute, infra, and therefore requisite to a cause of action for its breach. The plaintiff endeavored to prove by his own testimony that the advertisements were an inducement and that in reliance thereon he regularly purchased and smoked Chesterfields. This testimony, when subjected to the test of cross-examination, fell far short of the mark and apparently failed to impress the jury.

The Court instructed the jury, consistently with the foregoing assumption, as follows: "The law of Pennsylvania provides that any affirmation of fact, or any promise by the seller relating to the goods, is an express war-

ranty if the natural tendency of such an affirmation or promise is to induce the buyer to purchase the goods, *and if the buyer purchases relying thereon.*" (Emphasis supplied).

These instructions were undoubtedly consonant with the majority rule which is predicated on a construction of Section 12 of the Uniform Sales Act,[1] as adopted by many of the States. *Pedroli v. Russell,* 320 P.2d 873 (Cal. 1958); *Rogers v. Toni Home Permanent Co.,* 147 N.E. 2d 612 (Ohio 1958); *Frank v. Salomon,* 34 N.E. 2d 424 (Ill. 1941); see also text and Annotations, Frumer and Friedman, *Products Liability,* Vol. 1, § 16.04[4]. However, under the law of Pennsylvania the rule is not applicable where the factual affirmations run to the public and their natural tendency is to induce a purchase.

The applicable section of The Sales Act of Pennsylvania, 69 P.S. § 121, reads as follows:[2]

> "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and *if the buyer purchases the goods relying thereon* no affirmation of the value of the goods, nor any state-

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1. "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, *and if the buyer purchases the goods relying thereon.* No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty." (Emphasis supplied.)

2. Superseded by Uniform Commercial Code, §2-313, adopted April 6, 1953.

ment purporting to be a statement of the seller's opinion only, shall be construed as a warranty." (Emphasis supplied).

The quoted version differs from that which appears in The Uniform Sales Act.

It will be noted that in Section 12 of The Uniform Sales Act the conditional phrase "and if the buyer purchases the goods relying thereon," at the end of which a period appears, modifies the antecedent clause. In the version hereinabove quoted the same phrase, at the end of which no punctuation appears, introduces a proviso creating an exception to the general definition appearing in the first clause. While punctuation is seldom a reliable guide to statutory construction it is a relevant factor where, as here, its effect is to change the import of the statute. The materiality of the change is a significant indication that it was the intent of the Pennsylvania legislature not to follow Section 12 of The Uniform Sales Act as written.

An express warranty, within the meaning of the Pennsylvania statute, as we construe it, is any factual affirmation or promise, the natural tendency of which "is to induce the buyer to purchase the goods." Reliance of the buyer is not a requisite of either the warranty or a right of action for its breach. It follows that the instructions given were erroneous, as was the submission to the jury of the issue of reliance. Under the facts of this case the issue of reliance was wholly irrelevant; the only issue was whether the factual affirmations contained in the many advertisements were such as would naturally tend "to induce the buyer to purchase the goods."

This Court was called upon to construe the statute in the case of *Mannsz v. Macwhyte Co.*, 155 F. 2d 445 (1946). Therein the respective claims for damages, one for wrongful death and another for personal injury, were predicated upon the alleged breach of an express warranty contained in a manual circulated by the manufacturer. The plaintiffs attempted to prove that the purchase of a wire rope, which broke while being used to support a scaffold, was purchased in reliance on certain representations as to strength contained in the manual. They failed in this proof; in fact, there was no evidence in the record that the manual ever came to the attention of either the purchaser, who died in the accident, or his injured employee.

This Court held that where the factual representations run to the public and are such as would naturally induce a purchase neither privity of contract nor actual reliance on the representations is an essential element of a right of action under the statute. Accord *Worley v. Proctor & Gamble Mfg. Co.*, 253 S. W. 2d 532 (Mo. 1952); see also *Williston on Sales*, Vol. 1, §§206 and 208; Frumer and Friedman, *Products Liability*, supra. If a manufacturer extends to the public an express warranty that his product is harmless and thereafter a purchaser suffers personal injury as a result of its breach, the manufacturer cannot disclaim liability on the ground that there was no reliance on the warranty. The express warranty is an integral part of the contract of sale and may not be disaffirmed, after a breach has occurred, on the ground that the purchaser did not actually rely on it.

In the *Mannsz case*, supra, this Court sustained a judgment in favor of the defendant but on the ground

that the wire rope had been used for a purpose not intended by the manufacturer and this misuse placed it beyond the scope of warranty.

ASSUMPTION OF RISK AS DEFENSE

An action for personal injury based upon the breach of an express warranty, although it sounds also in tort, is in substance one for breach of contract. The availability of assumption of risk as a defense in such an action depends upon which of two concepts is adopted. The distinction may be of little importance in an action for personal injury based on negligence but it is important where, as here, an additional basis of liability is the alleged breach of an express warranty. See *Koshorek v. Pennsylvania Railroad Company*, 318 F. 2d 364, 367 (3rd Cir. 1963).

Assumption of risk in its secondary sense is ordinarily synonymous with contributory negligence and involves a failure to exercise reasonable care for one's own safety. Under this concept recovery is barred because of the plaintiff's departure from the standard of reasonable conduct and notwithstanding the misconduct of the defendant. *Potter v. Brittan,* 286 F. 2d 521 (3rd Cir. 1961) and cases hereinafter cited. Harper and James, *The Law of Torts,* § 22.2, p. 1201; Prosser, *Law of Torts,* 2nd Ed. § 55. Assumption of risk in its primary and strict sense involves voluntary exposure to an obvious or known danger which negates liability. Under this concept recovery is barred because the plaintiff is assumed to have relieved the defendant of any duty to protect him. *Ibid.*

In Prosser, *Law of Torts,* supra, cited with approval in *Koshorek v. Pennsylvania Railroad Company,* supra, the principles determinative of the distinction are stated as follows: "In working out the distinction, the courts have arrived at the conclusion that assumption of risk is a matter of knowledge of the danger and intelligent acquiescence in it, while contributory negligence is a matter of some fault or departure from the standard of reasonable conduct, however unwilling or protesting the plaintiff may be. The two may co-exist, or either may exist without the other. The difference is frequently one between risks which were in fact known to the plaintiff, or so obvious that he must be taken to have known of them, and risks which he merely might have discovered by the exercise of ordinary care." See also *Potter v. Brittan,* supra; *Sullivan v. Shell Oil Company,* 234 F. 2d 733, 739 (9th Cir. 1956), cert. den. 352 U. S. 925.

It has been held by the Superior Court of Pennsylvania, an intermediate court of appeals, that contributory negligence is inapposite as a defense in an action for breach of warranty. *Jarnot v. Ford Motor Company,* 156 A. 2d 568 (1959). We have found, and the parties to this appeal have cited, no other case in point. We are therefore obliged to follow this decision in the absence of persuasive evidence that the highest court of the State would reach a different conclusion. *McLouth Steel Corp. v. Mesta Machine Co.,* 214 F. 2d 608, 610 (3rd Cir. 1954), cert. den. 348 U. S. 873; *St. Clair v. Eastern Airlines, Inc.,* 302 F. 2d 477 (2nd Cir. 1962).

The rule as announced by the Superior Court appears to represent the majority view and is supported by substantial authority in other jurisdictions. *Green v. American Tobacco Co.,* 325 F. 2d 673, 679 (5th Cir.

1963), cert. den. 377 U. S. 943; *Brown v. Chapman,* 304 F. 2d 149, 163 (9th Cir. 1962); *Hansen v. Firestone Tire and Rubber Company,* 276 F. 2d 254, 258 (6th Cir. 1960); see also Frumer and Friedman, supra, § 16.01[3]. It was held in the cited cases that in an action for personal injury, predicated on breach of warranty, the defense of contributory negligence is inapposite. There are other decisions to the same effect. It seems reasonable to assume that the highest court of Pennsylvania would reach the same conclusion.

We are of the view, and so hold, that since contributory negligence is not available as a defense in an action for personal injury based on breach of warranty, assumption of risk in the sense of contributory negligence is likewise not available. However, if a consumer uses a product for a purpose not intended by the manufacturer and suffers an injury as a result, he may not recover because such misuse is beyond the scope of the warranty. See Frumer and Friedman, supra, § 16.01[3]. This was in essence the holding of this Court in *Mannsz v. Macwhyte Co.,* supra.

It is the law of Pennsylvania that a person who voluntarily exposes himself to a danger of which he has knowledge, or has had notice, assumes the attendent risk. He may not recover for personal injuries sustained as the result of the exposure because under the circumstances the person responsible for the danger is relieved of any duty to protect the injured person. *Kopp v. R. S. Noonan, Inc.,* 123 A. 2d 429 (1956); *Cutler v. Peck Lumber Mfg. Co.,* 37 A. 2d 739 (1944). It is clear from these cases that assumption of risk, in its primary and strict sense, is available as a defense in an action for personal

injuries based upon negligence. It follows as a matter of logic that the same defense is apposite in an action based on breach of express warranty.

The defense of assumption of risk rested solely on the testimony of the plaintiff which, viewed in the light most favorable to the defendant, was clearly insufficient. There was no evidence upon which the jury could have predicated a determination that the plaintiff either knew or had notice of the harmful effects of Chesterfields. Absent such evidence, the defense of assumption of risk failed.

There was overwhelming evidence that many of the defendant's advertisements carried factual affirmations, professedly based on medical research, that Chesterfields were safe and smoking them could have no adverse effect on "the nose, throat and accessory organs." These advertisements were calculated to overcome any fears the potential consumers might have had as to the harmful effects of cigarettes, and particularly Chesterfields. Under the circumstances it is difficult to perceive how the plaintiff, a cabinetmaker with no scientific background, could have been charged with notice or knowledge of a danger, which the defendant, with its professed superior knowledge, extensively advertised did not exist. We should emphasize that the medical researchers engaged by the defendant in 1952, apparently failed to detect the danger.

As hereinabove noted, assumption of risk was apposite as a defense in the action based upon breach of express warranty but only in its primary sense. However, the issue raised by the defense was submitted to the jury on general instructions which were inadequate

and confusing in that they failed to differentiate between the primary and secondary concepts; in the instructions these concepts were treated as equivalent. Absent such a differentiation, the instructions as given did not correctly relate the law to the issue and were therefore erroneous. *Atkinson v. Roth,* 297 F. 2d 570, 574 (3rd Cir. 1962); *McNello v. John B. Kelly, Inc.,* 283 F. 2d 96, 101, 102 (3rd Cir. 1960). It was also error to submit the issue to the jury in the absence of evidence to support the defense. *Morran v. Pennsylvania Railroad Company,* 321 F. 2d 402 (3rd Cir. 1963); *O'Neill v. Reading Company,* 306 F. 2d 204 (3rd Cir. 1962); *Smith v. Ellerman Lines,* 247 F. 2d 761, 766 (3rd Cir. 1957).

ARGUMENTS IN SUPPORT OF AFFIRMANCE

The defendant urges two principal grounds for affirmance and against reversal of the judgment. Preliminarily to our discussion of these grounds it should be stated that the trial errors in this case are attributable, at least in part, to the ineptness of plaintiff's counsel. He made no objections to the Court's instructions or the interrogatories on which the issues were submitted to the jury.

The defendant argues that the plaintiff here advances in support of reversal a theory different from that on which the case was tried and submitted to the jury. This argument has no support in the record. The plaintiff alleged the defendant's breach of warranty as one basis of liability. The issues tried and submitted to the jury were those raised in the denial of the allegation and the defense of assumption of risk. Reversal of the judgment is sought solely on the grounds that the court below committed error in the course of the

trial. This is clearly not a case in which there has been a change of theory.

The defendant argues also that since the plaintiff interposed no objection to either the court's instructions or the interrogatories submitted to the jury, the questions raised on this appeal should not be considered. It is the general rule that the appellate court will not consider trial errors to which no timely objection has been made. The rule is not inexorable and is subject to exception. *Hormel v. Helvering,* 312 U. S. 552, 557, 558; *Mazer v. Lipschutz,* 327 F. 2d 42, 52 (3rd Cir. 1964); *McNello v. John B. Kelly, Inc.,* supra; *Callwood v. Callwood,* 233 F. 2d 784, 788 (3rd Cir. 1956). Where it is apparent on the face of the record that a miscarriage of justice may have resulted from counsel's failure to properly protect the interest of his client by timely objection, the error must be noticed and rectified. *Ibid.* Since the errors in the trial of this case were fundamental and highly prejudicial, this exception to the general rule is applicable.

Judges Ganey and Freedman concur in the result in this case and in that portion of the opinion which deals with the defense of assumption of risk. The majority view on the question of reliance is discussed in the opinion of Judge Freedman, in which Judge Ganey joins.

The judgment of the court below will be reversed and the action will be remanded with the direction that a new trial be had.

Opinion by Judge Freedman, concurring.

I concur in the reversal of the judgment and the award of a new trial. I believe a new trial is required because the charge of the court did not adequately in-

struct the jury on the requirements of § 12 of the Sales Act of May 19, 1915, P. L. 543 (69 Purdon's Pa. Stat. Annot. § 121), which applies to this action, although it has since been superseded by the Uniform Commercial Code (Act of April 6, 1953, P. L. 3, § 2-313, 12A Purdon's Pa. Stat. Annot. §2-313).

In the first place, the charge is inadequate because it gave the jury no explanation of the meaning of § 12 of the Sales Act as it applied to the facts in the case which the jury was called upon to decide. An academic recitation of the language of a statute without any direction as to how it may be applied to the disputed facts before the jury is too general to furnish adequate guidance to them. *McNello v. John B. Kelly, Inc.*, 283 F. 2d 96 (3 Cir. 1960). Yet it was on this basis that the court submitted to the jury, which answered "No", Interrogatory No. 5: "Did the defendant make any express warranties upon which the plaintiff relied and by which he was induced to purchase Chesterfield cigarettes?"

The charge was defective not only for vagueness but also because of another error. It instructed the jury that they could not find an express warranty unless the seller "actually intended to be bound by his statement."[1] Such a requirement is contrary to the law of Pennsylvania since the adoption of the Sales Act of 1915 by which Pennsylvania departed from its previous adherence to the English rule. See 1 *Williston on Sales* (Rev. Ed. 1948), §§ 198-200; cf. *Rothermel v. Phillips*, 292 Pa. 371, 375-76 (1928). The true test is not whether the seller actually intended to be bound by his statement but rather whether he made an affirmation of

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1. R. 165a.

fact the natural tendency of which was to induce the sale and which did in fact induce it. Act of May 19, 1915, P. L. 543, § 12, 69 Purdon's Pa. Stat. Annot. § 121; 1 *Williston on Sales* (Rev. Ed. 1948), § 199.

Although thus joining in the order of reversal and remand for new trial, I believe it would be erroneous to retry the case on the supposed principle that reliance by the buyer on an express warranty is not required under § 12 of the Pennsylvania Sales Act. The opinion of Judge Smith, which is the opinion of the Court on all other questions in the case, would eliminate the requirement of reliance and thus makes irrelevant the jury's finding that no reliance in fact existed.[2] Its support for this unusual conclusion, admittedly contrary to the general interpretation of § 12 of the Uniform Sales Act, is a difference in punctuation between the section proposed by the Commissioners on Uniform State Laws and the Pennsylvania statute. Section 12 of the Uniform Sales Act, as it was adopted by the Commissioners (See 1 *Uniform Laws Annot.* (1950), p. 173; 1 *Williston on Sales* (Rev. Ed. 1948), § 194) reads as follows: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." The same section as it ap-

2. Although Interrogatory No. 5 contained two questions, i.e., did the defendant make an express warranty and did the plaintiff rely upon it, I shall assume that the jury's negative answer may be applied to both questions.

pears in the Pennsylvania pamphlet law reads precisely the same except for punctuation; there is no period after the word "thereon" and there is a comma after "seller's opinion only". The punctuation of the Uniform Sales Act, as the main opinion points out, makes it clear that the phrase dealing with reliance modifies the antecedent clause relating to express warranty and that the remaining clause deals with a separate matter, i. e., that no affirmation of value or statement of the seller's opinion shall be construed as a warranty. But because of the absence of the period in the Pennsylvania version the main opinion infers an intention that the reliance provision be deemed a part of the remaining clause, so that it would read: "and if the buyer purchases the goods relying thereon no affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only, shall be construed as a warranty." This to my mind makes the reliance provision of the section meaningless. For it is redundant to speak of reliance in regard to statements of value or opinion when they are themselves not to be considered as warranties. If such a construction would mean only that an affirmation of value or a statement of the seller's opinion shall not be construed as a warranty even if the buyer purchases the goods relying thereon, it would be an emphatic statement of the unnecessary. Moreover, it might well be argued from such a construction that such affirmations of value or statements of opinion can be construed as warranties if the buyer purchases the goods without relying on them. Reliance would take affirmations of value or statements of the seller's opinion outside the circle of warranty but non-reliance would bring them in. This is the opposite of what would normally be intended, i.e.,

that where there is only an affirmation of value or a statement of opinion there can be no warranty irrespective of any reliance. So it has been held in Pennsylvania. *Rothermel v. Phillips,* 292 Pa. 371, 375-76 (1928).

Section 12 of the Pennsylvania Act contains the same words as the Uniform Act. It can hardly be supposed that an intention to make such an important change in the Uniform Act on its adoption in Pennsylvania would not have been expressed in some change in language rather than in punctuation. Especially is this true in Pennsylvania, where the practice for many years has been to print bills without any punctuation and to leave it to the office of the Secretary of the Commonwealth to insert punctuation after the bill has been enacted.[3] The bill as it was adopted by the Legislature was without punctuation, and in accordance with the legislative practice § 12 contained no period or commas.[4] Since the language of the statute is identical with the Uniform Act and was unpunctuated at the time the statute was adopted it should be construed to have the same meaning as the Uniform Act. To arrive at a different and strange construction solely because of the absence of a period is to raise punctuation above its true significance and exalt a clerical act to an exercise of law-making power. It is established in Pennsylvania as a result of the legislative practice that punctuation cannot be relied upon in ascertaining the meaning of a

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3. See Act of April 9, 1929, P.L. 177, § 804, 71 Purdon's Pa. Stat. Annot. § 274. See also Act of May 4, 1905, P.L. 384, since repealed by Act of June 7, 1923, P.L. 498, § 2901.

4. See 1915 Legislative Journal—House, pp. 3210, 3220, reprinting the bill on final passage.

statute. Thus in *Wilson v. Wilson,* 126 Pa. Super. 423 (1937), the question arose whether sterility or incapacity to procreate was a ground for divorce. The causes for divorce in Pennsylvania had been laid down in the early Acts of September 19, 1785, 2 Sm. Laws 343, 12 Pa. Stat. at L. 94, § 2, and March 13, 1815, P.L. 150, 6 Sm. Laws 286, § 1. Both of these early statutes authorized divorce from a party who "at the time of the contract, was and still is naturally impotent or incapable of procreation." In the codification of the divorce laws of the Commonwealth in The Divorce Law of May 2, 1929, P.L. 1237, § 10(1), 23 Purdon's Pa. Stat. Annot. § 10, this language was repeated without change, but a comma was inserted before the phrase "or incapable of procreation". Plaintiff pointed to the comma in support of his contention that sterility was a ground for divorce separate from impotence. The court, rejecting this argument, said (p. 426): "It is of no importance that the present Act has added a comma after the word 'impotent'. 'There is no punctuation in a statute, which ought to rule:' Gyger's Estate, 65 Pa. 311, 312." The *Wilson* case was not an aberrant decision but followed a principle which a few months later the Legislature itself expressed in the Statutory Construction Act of May 28, 1937, P.L. 1019, § 53, 46 Purdon's Pa. Stat. Annot. § 553: "In no case shall the punctuation of a law control or affect the intention of the Legislature in the enactment thereof." Later, in *Kuntz v. Alliance Sand Co.,* 156 Pa. Super. 563 (1945), in rejecting an argument that the meaning of the statute be based on the absence of a comma, Reno, J., a former Attorney General of Pennsylvania, said: "The short and complete answer to the argument is that no significance attaches

to the punctuation of a statute. The legislature does not enact the punctuation which appears in the printed statutes. Bills introduced in the legislature may contain punctuation marks but they are entirely deleted by the printer. The printed bills which the legislature considers and passes and the Governor approves are totally devoid of punctuation marks. They are inserted later in the office of the Secretary of the Commonwealth when copies of the laws are prepared for the printer of the Pamphlet Laws, but they have no legislative sanction. For these reasons the legislature has expressly commanded that its intention shall not be controlled or affected by the punctuation [citations]. Reading the cited section, without punctuation, as it left the legislature and the Governor . . . [the court construed the statute]". (pp. 565-66).

The well established Pennsylvania practice which was later cast in the form of a statutory command is not weakened because of a stray decision running the other way. For if the meaning of legislation is to be affected by punctuation, the official who punctuates the bill would be engaged in a legislative act and the Legislature would be held to have delegated legislative power to the executive in violation of the Pennsylvania Constitution.[5] Pennsylvania's legislative practice may well

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5. See the interesting commentary by Schulz and Stahl on "The Enactment and Construction of Statutes in Pennsylvania", 46 Purdon's Pa. Stat. Annot., pp. 1, 30-1. The one or two cases running the other way are distinguished by the authors as "sports" and their statement why such views are erroneous is unanswerable: "[B]ills in the General Assembly are not punctuated, the periods and commas and other marks being

appear to be outmoded and the principle on which it is based—that the language of a bill should be so clear that no punctuation is necessary to aid in the expression of its meaning—may well be an unattainable ideal.[6] But

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inserted after the enactment by the Secretary of the Commonwealth. . . .

"The thought behind the unpunctuated bill is reputedly that the wording by itself should be so clear as to leave no doubt as to meaning which needs to be cleared up or changed by punctuation. If the sense is inserted or changed by the punctuation, the officer who punctuates the bill is actually legislating, contrary to the provisions of the Pennsylvania Constitution assigning the legislative power to the General Assembly." (p. 30).

For this reason the statement in Yeager Unemployment Compensation Case, 196 Pa. Super. 162 (1961) must be regarded as ill-considered dictum. See also the dissent in that case by Judge Flood at pp. 173-180, especially Note 1.

6. The effect of punctuation on meaning and how precision in language may minimize the need for punctuation are interestingly illustrated in DeVinne, The Practice of Typography: Correct Composition (1901), pp. 241, et seq., and Brossard, Punctuation of Statutes, 24 Oregon L. Rev. 157 (1945).

DeVinne, who has been very influential because he supervised the publishing of the Century Dictionary and Cyclopedia, states: "Rules are of value, whether they are found in grammars or are taught by proof-readers, but they can never take the place of an understanding of subject-matter. . . . Here is an illustration —a short sentence which can be made to convey contrary meanings by the insertion or omission of two commas.

"The prisoner said the witness was a convicted thief.

"The prisoner, said the witness, was a convicted thief." (p. 260).

we may not ascribe to the statute an intention derived from some other practice, one which the Legislature has not adopted.

We recognized and applied the Pennsylvania practice in construing a Pennsylvania statute in *In Re Industrial Sapphire Mfg. Co.*, 182 F. 2d 589 (3 Cir. 1950), where Judge Goodrich said: "Once we are freed from the commas the statute, we think presents no difficulty and we give it the construction we think is the natural one." (p. 591).

I think § 12 of the Pennsylvania Sales Act should also receive a natural and sensible construction, one which its draftsman — who was Professor Williston and not the Pennsylvania Legislature — obviously intended. An intention so clearly and authoritatively written should not be uprooted and rendered meaningless by the subordinate element of punctuation, especially when it is irrelevant.

Brossard, whose article was submitted as a report to the National Conference of Commissioners on Uniform State Laws, of which he was a member, shows how this sentence might properly have been written so that its meaning would not be altered by punctuation: "That sentence would not depend on points if it were reconstructed thus: 'The prisoner said that the witness was a convicted thief' or 'The witness said that the prisoner was a convicted thief.' Similar examples of bad syntax have been used to prove that meaning may hang on a comma. Here is one: 'Woman, without her, man would be a savage.' 'Woman, without her man, would be a savage.' Or take this schoolboy riddle: 'Would you rather a lion eat you, or a tiger?' The comma is relied on to keep the lion from eating the tiger. Those are mere plays on words. Word juggling may be indulged in for amusement; but a statute is no place to 'conjure with us in a double sense'." (p. 170).

For half a century the courts of Pennsylvania have indicated without any apparent suspicion of doubt that § 12 of the Sales Act of 1915 requires reliance on an express warranty. They have quoted the statute in a form which assumes that the last clause is a separate sentence and that the provision regarding reliance modifies the preceding language dealing with express warranty rather than the subsequent clause that an affirmation of value and a statement of seller's opinion alone do not constitute a warranty. Illustrations of this will be found in *Butcher v. Newburger,* 318 Pa. 547, 552 (1935), where the phrase on reliance is quoted as part of the description of express warranty and where if reliance were legally unnecessary much of the court's discussion would have been irrelevant. In *C. D. Brown & Co., Inc. v. Standard Hide Co.,* 301 Pa. 543, 548 (1930), the court quoted the first part of § 12 as qualified by the requirement of reliance and then went on to say that a statement of value is excepted from the rule. In *Yonker v. Baneer,* 91 Pa. Super. 157, 161 (1927), a charge requiring actual inducement was approved. See also *Pantano v. Zamer Motor Sales Co.,* 170 Pa. Super. 317, 323 (1952), to the effect that there was no right of action for breach of warranty where the buyer relied on its own inspection rather than the warrantor's statement. Professor Williston, reviewing the changes effected in Pennsylvania by the Sales Act of 1915, concludes: "Although the effect of old decisions is hard to obliterate, the plain words of the Sales Act must override them, and it has ultimately been recognized that sufficient essentials of a warranty exist where there is an affirmation, the tendency of which

is to induce the sale *and which does induce it.*" 1 *Williston on Sales* (Rev. Ed. 1948), § 199, p. 512. (Emphasis added).[7]

In addition to the frequent instances in which the Pennsylvania courts have drawn the reliance phrase into the preceding portion of § 12 dealing with warranty, there are cases which show the necessary complement that the provision that affirmations of value or a statement of seller's opinion are not to be construed as a warranty is complete in itself and separate from the reliance

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7. A contemporary expression of the understanding of § 12 of the Pennsylvania Sales Act is found in the discussion of § 2-313 of the Uniform Commercial Code. The Pennsylvania Bar Association's notes to the section state in regard to subsection (1)(a) dealing with express warranty: "Under the Code, the qualification that affirmations, etc. create a warranty if made 'as a basis of' the bargain, appears to be substantially the same as the 'reliance' qualification in § 12 of the Uniform Sales Act, 69 P.S. § 121, (repealed)." In discussing Subsection (2), dealing with affirmations of value or statements of seller's opinion, the Bar Association's note states: "The qualification as to statements of 'value' rephrases but does not appear materially to change § 12 of the Uniform Sales Act, 69 P.S. § 121 (repealed).": 12A Purdon's Pa. Stat. Annot., p. 162. Similarly, see the Report of the Subcommittee on the Proposed Uniform Commercial Code of the Joint State Government Commission of the Pennsylvania General Assembly (1952), p. 23.

The comment by the drafters of the Uniform Commercial Code confirms this view. They make it clear that what was formerly described as reliance is now absorbed as a factor which is made a basis of the bargain. Comment 3 to § 2-313 states that where a statement is made *during a bargain* no particular evidence of reliance need be shown, but that it remains a question of fact whether evidence introduced by the defendant is sufficient to show non-reliance.

clause. This is strikingly shown in *Rothermel v. Phillips,* 292 Pa. 371, 375-76 (1928), where Mr. Justice Sadler quoted § 12 of the Pennsylvania Sales Act in two parts; in the first part quoting the language dealing with affirmation of fact or promises by the seller he included the clause relating to the buyer's reliance, but he excluded it in quoting the clause that affirmations of value or statements of the seller's opinion alone are not to be construed as a warranty. The case was then explicitly decided on the second clause of § 12.

It is clear, therefore, that the conclusion of the main opinion constitutes a wide departure from the settled view in Pennsylvania that § 12 of its Sales Act is the same as the Uniform Act, and creates an unwarranted gulf between the Pennsylvania Sales Act and the equivalent provision of the Commercial Code.

Reliance is a question of fact. In the language of the Sales Act the question is whether the buyer relied on an affirmation of fact or promise by the seller. The main opinion would remove this factual question and instead make the test under the Pennsylvania Sales Act whether the factual affirmation or promise had the natural tendency to induce the buyer to purchase the goods. Natural tendency to induce is not the same as actual reliance. It may be that in many cases the circumstances which will indicate the natural tendency to induce the buyer to purchase the goods will also be enough to show reliance. But this element of fact which is ever present should not be withdrawn from determination by the jury.

I do not consider that our decision in *Mannsz v. Macwhyte Co.,* 155 F. 2d 445 (3 Cir. 1946), stands in the way. There the injured plaintiff sued the manufacturer of wire

rope for negligence and breach of express warranty. We sustained the dismissal of the action because of plaintiff's failure to prove either negligence in the manufacture of the rope or its inadequacy for its intended use. In the course of the opinion it was said that in *Henderson v. National Drug Co.*, 343 Pa. 601 (1942), Pennsylvania had adopted the principle of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382 (1916), that privity was not required in a suit for negligence. The opinion then went on to state that the abolition of privity extended also to actions for breach of warranty and indicated that reliance on the representations was unnecessary. This statement, which went beyond the necessities of decision, was unsupported at the time. Since then the Supreme Court of Pennsylvania, while reiterating the view that privity is no longer required in an action for negligence, has emphatically declared that the privity requirement retains a definite vitality in suits for express warranty. The reason for this has been stated to be that a defendant should not be held to be a guarantor of his product in cases where liability should rest on negligence. The Court has been strict in maintaining that one who is not a purchaser may not maintain a claim of breach of warranty where there is an absence of privity, although it has extended the concept of purchaser to include, in addition to the immediate purchaser, the subpurchasers along the line from manufacturer to ultimate consumer.[8]

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8. With the adoption of the Uniform Commercial Code in Pennsylvania this rule has necessarily been expanded to include, by virtue of § 2-318 (12A Purdon's Pa. Stat. Annot. § 2-318), one who is in the family or household of the buyer or a guest in the buyer's home if it is reasonable to expect that he may use, consume or be affected by the goods. See Yentzer v. Taylor Wine Company, 414 Pa. 272 (1964).

Even subsequent purchasers may recover from the original seller only where his express promise may be said to be a part of the consideration for the purchase and is meant to be conveyed to and relied upon by subsequent purchasers. See *Silverman v. Samuel Mallinger Co.*, 375 Pa. 422, 428-29 (1953); *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 616 (1963); *Yentzer v. Taylor Wine Company*, 414 Pa. 272 (1964). See also *Driver v. F. A. Mitchell Co.*, 35 F.R.D. 226 (E.D.Pa. 1964). In the present Pennsylvania law under the Uniform Commercial Code[9] the element of reliance on the part of the buyer will be absorbed in the determination of the basis of the bargain, but it will remain a question of fact to be determined by the jury where the seller seeks to show that his affirmation was not a part of the basis of the bargain.

I would hold, therefore, that the issue of reliance is not irrelevant and that whether the factual affirmations in the advertisements were such as would naturally tend to induce the buyer to purchase the goods was not the only issue. On the contrary, in my view it was necessary for the plaintiff to show that affirmations of fact relating to the goods had a natural tendency to induce the buyer to purchase the goods and that the buyer purchased the goods relying thereon. The jury could, in my view, have found that these requirements were met under the evidence in this case. They should have been told how the evidence bore on the question of natural tendency to inducement and how that same evi-

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9. Section 2-313, 12A Purdon's Pa. Stat. Annot. § 2-313.

dence was relevant to the question of reliance. This the court below did not undertake to do, and this it should do on a retrial.

I am authorized to state that Judge Ganey joins in this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Original Judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,802

ANITA PRITCHARD, ADMINISTRATRIX OF THE ESTATE OF OTTO E. PRITCHARD, DECEASED,
Appellant,

vs.

LIGGETT & MYERS TOBACCO COMPANY,
A CORPORATION,
(D. C. CIVIL No. 12820)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GANEY, SMITH and FREEDMAN, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court, filed November 9, 1962 and entered November 13, 1962, be, and the same is hereby reversed, with costs, and the action remanded with the direction that a new trial be had.

Attest:

M. ELIZABETH FERGUSON
Deputy Clerk

July 26, 1965

December 22, 1966 Order of Court.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 14,802

ANITA PRICHARD, Administratrix of the Estate of OTTO E. PRITCHARD, Deceased, Appellant

vs.

LIGGETT & MYERS TOBACCO COMPANY, a corporation

Present: GANEY, SMITH and FREEDMAN, *Circuit Judges.*

It is ORDERED that the mandate of this Court issued September 17, 1965, in the above-entitled case be and it hereby is recalled;

It is FURTHER ORDERED that the judgment of this Court be amended in accordance with the opinion of the Court filed today, to read as follows:

> On consideration whereof, it is now here ORDERED and ADJUDGED by this Court that the judgment of the District Court, filed November 9, 1962, and entered November 13, 1962, be and the same is hereby reversed, with costs, and the action remanded with the direction that a new trial be had limited to the issues of liability and damages, but no new trial shall be had as to the finding that the cause, or one of the causes, of cancer was the smoking of Chesterfield cigarettes by the plaintiff, as set forth in special finding of fact No. 1;

It is FURTHER ORDERED that the mandate be reissued in accordance with the opinion of the Court filed this day.

By the Court,

WILLIAM F. SMITH
Circuit Judge

Dated December 22, 1966

Amended Judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 14,802
ANITA PRITCHARD, Administratrix of the Estate of OTTO E. PRITCHARD, Deceased,
Appellant
vs.
LIGGETT & MYERS TOBACCO COMPANY, a corporation
(D. C. Civil No. 12820)
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GANEY, SMITH and FREEDMAN, *Circuit Judges.*

Amended Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 9, 1962 and entered November 13, 1962, be and the same is hereby reversed, with costs, and the action remanded with the direction that a new trial be had limited to the issues of liability and damages, but no new trial shall be had as to the finding that the cause, or one of the causes, of cancer was the smoking of Chesterfield cigarettes by the plaintiff, as set forth in special finding of fact No. 1.

ATTEST:
IDA O. CRESKOFF
Clerk

December 22, 1966

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14802

ANITA PRITCHARD, Administratrix of the Estate of OTTO E. PRITCHARD, Deceased,
Appellant
v.
LIGGETT & MYERS TOBACCO COMPANY, a corporation, *Appellee.*

ON MOTION FOR CLARIFICATION OF MANDATE

Submitted July 22, 1966

Before GANEY, SMITH and FREEDMAN, *Circuit Judges.*

Amended Opinion of the Court

(Filed December 22, 1966)

PER CURIAM.

This matter was heretofore before the Court on an appeal from a judgment in favor of the defendant in an action for personal injury based on negligence and breach of warranty. 350 F. 2d 479, cert. den. 382 U.S. 987. The appeal was from that portion of the judgment which was predicated upon the jury's determination on the issues relating to the alleged breach of warranty. The Judgment was reversed and the action was remanded to the court below "with the direction that a new trial be had." The matter is now before the court on a "Motion for Clarification of Mandate" filed by the appellant. Although the mandate does not require clarification, the earlier opinion of this court and the mandate must be amended.

Pursuant to Fed. Rules Civ. Proc., rule 49(a), 28 U.S.C.A., the issues were submitted to the jury on special interrogatories in response to which the jury found: (1) the smoking of Chesterfield cigarettes by the plaintiff was "the cause, or one of the causes," of cancer; (2) the defendant was not chargeable with negligence; (3) the defendant made no "express warranties upon which the plaintiff relied and by which he was induced to purchase" the cigarettes; and (4) the plaintiff assumed the risk of injury by his smoking the cigarettes. Since the issue of causation was decided by the jury in the earlier trial, the plaintiff may not be required to relitigate the same issue when the action is retried. *Green v. American Tobacco Co.*, 325 F. 2d 673, 678 (5th Cir. 1963), cert. den. 377 U.S. 943. However, the issues as to liability and damages must be relitigated.

The last paragraph of our filed opinion, page 11, will be amended to read as follows: "The judgment of the court below will be reversed and the action will be remanded with the direction that a new trial be had limited to the issues of liability, (except as to the finding that the cause, or one of the causes, of cancer was the smoking of Chesterfield cigarettes by the plaintiff, as set forth in special finding of fact No. 1), and damages." The mandate will be amended accordingly.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Statement of Purpose of Appeal*

Plaintiff here appeals from a final judgment entered by the trial court pursuant to a jury verdict. The judgment appealed from was entered on November 9, 1962. Following entry of adverse judgment the plaintiff moved for a new trial which was denied on January 2, 1964, thereafter timely appeal was perfected in this court.

The appellant plaintiff does not seek a complete new trial in this appeal. This case was submitted to the jury on interrogatories at the suggestion of this court in its Opinion on a previous appeal. 295 F.2d 292 at 301. Plaintiff is not appealing from the jury's answer to Interrogatory No. 1, which was:

> "Was the smoking of Chesterfield cigarettes by the plaintiff the cause or one of the causes of cancer in his right lung?

Answer: Yes.

Nor from Interrogatory No. 4:

> "Did the plaintiff give notice of a breach of warranty within a reasonable time as required by the Sales Act?

Answer: Yes.

Plaintiff does, by means of this appeal, seek to negate and thus gain a new trial, with respect to the jury's answers to the following interrogatories:

V. Did the defendant make any express warranties upon which the plaintiff relied and by which he was induced to smoke Chesterfield cigarettes?

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*From Appellant's Brief on Appeal after second trial.

Answer: No.

VII. Did the plaintiff assume the risk of injury by his smoking of Chesterfield cigarettes?

Answer: Yes.

If this Court grants a new trial as to those issues which plaintiff contends he is entitled, plaintiff and defendant are still bound by the jury's answers to those interrogatories which have not been appealed from and which are not changed by the ultimate Opinion of this Court. *Green v. American Tobacco Co.*, 325 F.2d 673 at 678 (5th Cir. 1963), cert. denied, May 25, 1964 (No. 961-997).

In brief plaintiff seeks relief from the jury's answers to those interrogatories dealing with express warranty, and assumption of risk.

SUPREME COURT, U. S.

No. 1176

FILED
APR 5 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,
v.
ANITA PRITCHARD, Administratrix of the Estate of OTTO E. PRITCHARD, Deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. ....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,
v.
ANITA PRITCHARD
Administratrix of the Estate of
Otto E. Pritchard, Deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Although petitioner asserts that the court below "acted beyond its power and jurisdiction" in amending its mandate and opinion in this case (Pet. 19), it cites no statute or rule so limiting the jurisdiction of the courts of appeals. And although petitioner asserts a conflict with decisions of other courts of appeals (Pet. 19, 24), it cites no case denying that a court of appeals has such power but only cases in which particular courts of appeals refused to exercise their power. That the power exists is clear.

> In spite of the ending of the term at which our mandate went down, we have power over our mandate, not only to declare what we meant, but to change it as we think the situation demands.

National Comics Publications, Inc. v. Fawcett Publications, Inc., 198 F.2d 927 (2d Cir. 1952). The actions of this Court in such cases as *Cahill v. New York, N. H. & H. R. Co.*, 351 U.S. 183 (1956), and *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965), are authority enough for the action of the court below.

This was an appropriate case in which to exercise the power, for the parties and the trial court should not be left in doubt as to the scope of the new trial the appellate court had ordered. Although petitioner announces repeatedly that the original mandate was "clear and unambiguous" (Pet. 19, 23), and that it "clearly meant a full new trial" (Pet. 20; cf. 8), only Humpty Dumpty can make a thing so by saying it three times. That the court of appeals intended a complete new trial was not clear to the trial judge, who asked for a memorandum on the question (Pet. 9). It was not clear to the respondent, who moved for clarification of the mandate. And it was not clear to the court of appeals, which, on respondent's motion, made it clear that it did not intend to have the issue of causation retried. Some years ago the Second Circuit in an opinion spoke several times of a "new trial" and remanded for "a new trial on the valuation of the condemned property." The trial judge construed this as not requiring a complete new trial on valuation, but only reopening of the record for introduction of evidence held to have been erroneously excluded. On a second appeal the Second Circuit, in a per curiam opinion by Chief Judge Charles E. Clark, held that the trial court had properly construed the mandate, and that "this interpretation was obviously in harmony with considerations of expedition

and of economy in judicial administration." *United States v. 63.04 Acres of Land,* 257 F.2d 68, 69 (2d Cir. 1958).

Finally petitioner contends that it is unconstitutional to order a new trial on less than all the elements of a theory of liability. For this proposition it cites (Pet. 13-14) two cases in which, in particular circumstances, courts of appeals have refused to order a partial new trial, though they have not held that it would be unconstitutional so to do. Petitioner does not cite *Furr v. Herzmark,* 206 F.2d 468, 472 (D.C.Cir. 1953), in which the court, while recognizing that "in a sense the issue in the end is the single one of negligence," ordered a new trial as to certain aspects in which defendant was claimed to have been negligent but not as to others. Nor does petitioner cite *Mazer v. Lipschutz,* 327 F.2d 42, 52 (3rd Cir. 1964), in which a new trial was ordered on the vicarious liability of defendant, though the jury's finding that he was not individually liable was allowed to stand, or *Gallo v. Crocker,* 321 F.2d 876 (5th Cir. 1963), where a new trial was limited to the single issue of whether two defendants were jointly liable. Finally petitioner makes only a glancing reference (Pet. 18) to *Green v. American Tobacco Co.,* 325 F.2d 673, 678 (5th Cir. 1963), a case strikingly similar to the present case. There a new trial was ordered on the warranty issue, but it was held that the parties were bound by the determination of the first jury on special interrogatories that defendant's cigarettes were the cause of plaintiff's lung cancer. This limitation of the new trial was attacked by the manufacturer on petition for certiorari,

but this Court refused to review the case. 377 U.S. 943 (1964). Review should also be refused in this case.

Respectfully submitted,

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April , 1967

REPLY

BRIEF

FILED
APR 15 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 1176

LIGGETT & MYERS TOBACCO COMPANY,
Petitioner,
v.
ANITA PRITCHARD, Administratrix of the Estate of
OTTO E. PRITCHARD, Deceased,
Respondent.

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 1176

LIGGETT & MYERS TOBACCO COMPANY,
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v.

ANITA PRITCHARD, Administratrix of the Estate of OTTO E. PRITCHARD, Deceased,
Respondent.

PETITIONER'S REPLY BRIEF

Respondent's (plaintiff's) brief in opposition was served on counsel for petitioner (defendant) on April 6, 1967. Thus, this reply brief is timely.

Plaintiff's brief in opposition completely ignores a central issue raised by defendant's petition—does the truncated retrial now ordered by the Third Circuit's amended judgment and mandate deprive defendant of a fair trial as guaranteed by the Seventh Amendment. Plaintiff neither cites nor discusses the standards of fairness to be applied to retrials as stated by this Court in *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931). Neither the Third Circuit below nor the Fifth Circuit in *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963), *cert. denied*, 377 U.S. 943 (1964) dis-

cussed or applied these standards. We submit that, under the standards of *Gasoline Products*, defendant has been denied a fair trial.

A central issue raised by this petition is one of fairness. A reading of the record of the second trial establishes that plaintiff had a full and fair trial before a jury. Nevertheless, the Third Circuit reversed a verdict for defendant based on special jury findings because of alleged error in the charge. Plaintiff made no objection to the charge in the trial court or even on appeal. Disregarding Rule 51 of the Federal Rules of Civil Procedure, the Third Circuit, on its own initiative, unearthed error in the charge and reversed. Defendant's verdict was negated on grounds which defendant never had an opportunity to brief or argue. Furthermore, the Third Circuit held that there was insufficient evidence to support the jury finding of assumption of risk, despite the fact that plaintiff had never moved for a directed verdict pursuant to Rule 50 (b), a mandatory prerequisite for raising sufficiency of evidence on appeal. Then, seventeen months after it had ordered a retrial of the express warranty count, the Third Circuit, again on its own initiative, amended its previous judgment and ordered a partial retrial in which the prior jury's finding on causation, the only finding adverse to defendant, is to stand but the other findings on express warranty must be retried.

This Court should grant certiorari to afford fair treatment to this corporate defendant and require the Third Circuit to apply, with an even hand, the procedural and substantive fairness which is expected in federal

trials. The two Supreme Court cases cited by plaintiff to support the action of the court of appeals in fact support defendant's argument. In *Cahill v. New York, N.H. & H.R.R. Co.*, 351 U.S. 183 (1956) and *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965), this Court acted to achieve fairness. Defendant seeks the same result.

Ignoring the fundamental issue of fairness, plaintiff's brief in opposition seems to make three points. First, a court of appeals may amend its judgment at any time and for any reason or for no express reason—as the Third Circuit did in this case. Second, this was an appropriate case to amend the judgment because the original judgment was not clear. Third, partial trials have been ordered on less than all the elements of a theory of liability. All three of these points are completely devoid of merit.

Final judgments of courts of appeals cannot be altered and amended at the whim of those courts. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). As far as one can tell from the amended opinion and judgment, the Third Circuit gave no consideration to whether or not a partial retrial would be fair to defendant and did not attempt to apply the standards of *Gasoline Products*. Plaintiff seeks to justify the amendment by relying on broad language in *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 198 F.2d 927 (2d Cir. 1952) which is pure *dictum*. There, the Second Circuit did not amend its judgment but merely clarified language it had used in its opinion, hardly the situation here. Even this Court will only

amend its judgments in unusual cases and then only to avoid manifest injustice.

Plaintiff misstates defendant's position. Defendant did not say that no court ever has the right to amend its judgment at a later date, but rather made it quite clear that, *in the circumstances of this case,* the Third Circuit lacked the power and jurisdiction to amend its judgment. (Pet. 19, et. seq.).

Plaintiff also is mistaken in its claim that this was an appropriate case for amendment because the scope of the new trial was left in doubt by the original judgment and mandate. The scope of the new trial was clear to everyone. At the pretrial conference on June 24, 1966, Judge Miller stated that the mandate for "a new trial" meant to him a full new trial. As a matter of courtesy he extended to plaintiff the opportunity to submit a memorandum. No transcript of this pretrial conference was taken, but as attorneys for defendant, we represent that the foregoing is an accurate statement of what occurred. Plaintiff also seems to have been aware of the meaning of the original mandate since he failed to submit the issue to Judge Miller, but instead sought relief in the court of appeals. The court of appeals also understood that its original mandate required a full new trial because it explicitly stated in its amended opinion that the prior mandate required no clarification but "must be amended". (A 56).

The case of *United States v. 63.04 Acres of Land,* 257 F.2d 68 (2d Cir. 1958) is irrelevant since it was tried by a judge without a jury and was remanded to

the same judge to consider additional evidence. There the same trier of fact considered all the evidence in arriving at a decision. Here, there will be a different jury which will not be allowed to hear all the relevant evidence on the issues which they must decide.

None of the cases cited on page 3 of the brief in opposition negates defendant's argument that a single theory of liability should not be retried on less than all the elements of that theory (Pet. 13). In *Furr v. Herzmark,* 206 F.2d 468 (D.C. Cir. 1953), the court of appeals merely held that on certain allegations of negligence there was insufficient evidence to go to the jury. On those allegations for which there was sufficient evidence, all the elements of a cause of action for negligence were retried, including causation. Similarly, in *Mazer v. Lipschutz,* 327 F.2d 42 (3rd Cir. 1964), *cert. denied,* 385 U.S. 833 (1964) and *Gallo v. Crocker,* 321 F.2d 876 (5th Cir. 1963), several distinct causes of action were involved and a new trial was ordered with regard to one cause of action (See Pet. 13).

Plaintiff also relies heavily on this Court's denial of certiorari in *Green.* Denial of certiorari, however, does not indicate approval or disapproval. Now that another court of appeals has reversed certain findings under Rule 49 while investing other findings with a finality unjustified by considerations of fairness or by the Federal Rules of Civil Procedure, this Court should consider whether the principles of *Gasoline Products* apply. (See Pet. 18-19).

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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